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IN THE

Supreme Court of the United States

October Term, 1952

No. 519

SIG ELLINGSON and COMPANY, a Corporation,
Petitioner,

vs.

R. T. DE VRIES, SR., R. T. DE VRIES, JR., and JOHN D. DE VRIES, partners, doing business under the firm name of DE VRIES AUCTION COMPANY,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The following matters are respectfully presented:

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit appears in the Record at pages 49-52 and is reported in

199 F. (2d) 677. The opinion of the United States District Court for the District of Minnesota, under review in the Court of Appeals, is reported in 100 F. Supp. 781.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on October 28, 1952 (R. 54) and rehearing was denied November 17, 1952 (R. 65). Issuance of the mandate was stayed pending application for certiorari to this Court (R. 67). The petition for writ of certiorari was filed December 30, 1952. The jurisdiction of this Court is invoked under Sec. 1254 of Title 28, United States Code.

STATEMENT OF CASE

This is an action for the conversion of 33 head of cattle (R. 2) of the value of $5,567.77 (R. 18) for which amount judgment for respondents was entered on August 18, 1951 in the United States District Court for the District of Minnesota, Third Division (R. 32). This judgment was affirmed by the Court of Appeals for the Eighth Circuit on October 28, 1952 (R. 54), and petition for rehearing was denied on November 17, 1952 (R.65). Jurisdiction is based on diversity of citizenship and the requisite amount in controversy (R. 16).

There is no dispute as to the facts, which are summarized below.

Petitioner is a Minnesota corporation engaged in the livestock commission business at the public stockyards at South

St. Paul, Minnesota (R. 16) and licensed as a "market agency" under the Packers and Stockyards Act of 1921, 7 U. S. C. A. §§ 181-231 (R. 16).

On April 19, 1950 petitioner, in the usual course of its business, sold the cattle for the account of one Tobias Brackey (R. 15, 17, 18), delivered the cattle, collected the sales price, and accounted for and remitted the net proceeds to Brackey (R. 18).

On the previous day, at Buffalo Center, Iowa, Brackey had procured the cattle from respondents, who were the owners thereof by issuing a worthless check for the purchase price (R. 13-16). Respondents have not been paid for their cattle (R. 18). There is no claim that petitioner acted otherwise than in good faith. There is no claim that petitioner relied upon any documents or indicia of title in the hands of Brackey.

The case presents two questions. These are:

(1) whether petitioner is a converter of the cattle under local law, applied under the doctrine of *Erie Railroad Company v. Tompkins,* 304 U. S. 64;

(2) whether the effect of the Packers and Stockyards Act of 1921 (7 U. S. C. A. Secs. 181-231) is to abrogate local rules of property and exculpate the petitioner.

The courts below held that petitioner is liable for conversion under applicable local law and that the Packers and Stockyards Act does not abrogate local rules of property and does not exculpate the petitioner.

ARGUMENT

1. Introduction.

There are no special or important reasons for further review of this case. The question is primarily one of local law regarding which the District Court and the Court of Appeals are in agreement. There is no probable conflict with applicable local decisions. Although a question is raised as to the application of the Packers and Stockyards Act of 1921 (7 U. S. C. A. §§ 181-231), it is believed that no important question of federal law is involved. The decision below is not in conflict with any decision of any other Court of Appeals. It is in accord with two important state decisions which this Court has declined to review by certiorari.[1] It is otherwise adequately supported on principle and by authority. No probable conflict with applicable decisions of this Court is indicated.

2. The applicable local law.

It is a settled rule of law, specifically adhered to in both Minnesota and Iowa, that if an agent sells personal property for a principal who is without authority to sell, the agent is liable for assisting the principal in the conversion of the goods, regardless of the innocence or good faith of the agent.

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[1] *Rice Bros. v. Birmingham*, 332 U. S. 768, reh. den. 332 U. S. 820; *Sig Ellingson and Company v. Mason City Production Credit Association*, 308 U. S. 599, reh. den. 308 U. S. 637 (in which this Court declined to review *Birmingham v. Rice Bros.*, 238 Ia. 410, 26 N. W. (2d) 39 and *Mason City Production Credit Association v. Sig Ellingson and Company*, 205 Minn. 537, 268 N. W. 713.

This is the law of Minnesota under:

Mason City Production Credit Association v. Sig Ellingson and Company, 205 Minn. 537, 286 N. W. 713, cert. den., 308 U. S. 599, reh. den. 308 U. S. 637;
Johnson v. Martin, 87 Minn. 370, 92 N. W. 221

and the law of Iowa under:

Birmingham v. Rice Bros., 238 Ia. 410, 26 N. W. (2d) 39, cert. den. 332 U. S. 768, reh. den. 332 U. S. 820

Under this rule the agent is liable whenever the principal is without title or right to sell. It is immaterial whether the wrongdoing principal is a thief, a fraudulent mortgagor, an embezzling bailee, or one who for other reasons is not in a position to pass title.

The application of the rule to cases where the principal has acquired the goods by the use of a bad check depends upon the local rule as to the passage or non-passage of title. Where a check is given for the purchase price of goods, some states adopt a theory of voidable title,[2] whereas others adopt a theory of conditional payment. The latter rule prevails in both Iowa and Minnesota, where a check is only a conditional payment and no title passes to the purchaser unless the check is honored when presented. This local rule of property, applies whether the drawer of the check is guilty of affirmative fraud or mere inadvertence. The proposition is established in Iowa by:

Birmingham v. Rice Bros., 238 Ia. 410, 26 N. W. (2d) 39,

[2](e. g., *Sullivan v. Larson,* 149 Neb. 97, 30 N. W. (2d) 460)

and in Minnesota by:

Gustafson v. Equitable Loan Association, 186 Minn. 236, 243 N. W. 106

These decisions, applied to the instant case, required the conclusion that Brackey was without title to the cattle at the time of their sale by the petitioner at South St. Paul, Minnesota for Brackey's account.

Since Brackey was without title, the petitioner was liable for assisting Brackey in his act of conversion, even though petitioner was innocent of intentional wrongdoing.[3] This is the effect of *Birmingham v. Rice Bros.,* 238 Ia. 410, 26 N. W. (2d) 39, and *Mason City Production Credit Association v. Sig Ellingson and Company,* 205 Minn. 537, 286 N. W. 713.

Therefore the Court of Appeals was correct in its determination that it "found no error in the trial court's conclusions as to the law of Iowa and of Minnesota, nor in the application thereof to the undisputed facts in the case."[4] Moreover, there is nothing to suggest "a definite conviction of error in the conclusion" within the meaning of the rule of review stated in *Helvering v. Stuart,* 317 U. S. 154, 163, and *Estate of Spiegel v. Commissioner,* 335 U. S. 701, 708.

3. The Packers and Stockyards Act.

The petitioner argues in substance that as a licensed "market agency" under the Packers and Stockyards Act (7 U. S. C. A. Secs. 181-231) it has become a federal public utility;

[3]The result would have been otherwise had the petitioner relied upon documents of title or other indicia of ownership (*Crescent Chevrolet Co. v. Lewis,* 230 Ia. 1074, 300 N. W. 260; *White v. Pike,* 240 Ia. 596, 36 N. W. (2d) 761). Since there was no such reliance, the respondents are not exculpated. *Moberg v. Commercial Credit Corp.,* 230 Minn. 469, 42 N. W. (2d) 54.

[4]199 F. (2d) 677 at 678.

that as such it must unquestioningly accept all cattle tendered for sale (whether owned, mortgaged, stolen or fraudulently procured); that it should accordingly be exonerated in all cases where it has acted in good faith; and that unless exonerated it is deprived of property without due process and denied the equal protection of the laws, with fatal burdens upon interstate commerce.

To sustain petitioner's argument, it is insufficient merely to characterize a "market agency" as a "public utility" and then to argue that every exemption enjoyed by any public utility is required to attach to market agencies. It must appear that Congress intended to abrogate prevailing rules of property and tort law or that their abrogation by judicial decision is required to avoid the imposition, *in invitum*, of burdens so onerous as to be objectionable under the Commerce Clause or the Fourteenth Amendment.

The Packers and Stockyards Act discloses no intention to confer special immunities upon market agencies. The purpose of the Act, as interpreted in *Stafford v. Wallace*, 258 U. S. 495, is to correct stated abuses in the handling of livestock, with particular reference to "unfair, discriminatory or deceptive practices". The corrective remedies take the form of the licensing and bonding of "market agencies", the regulation of rates and the prohibition of undesirable practices, with emphasis upon the concept of strict accountability. Section 209, which imposes liability for certain violations of the Act, provides in terms that:

> "This section shall not in any way abridge or alter the remedies existing at common law or by statute, but the provisions of this chapter are in addition to such remedies".

Hence it appears that the Court of Appeals rightly held that the Congress has made "no attempt to declare who should be deemed the owner of cattle turned over for a bad check" and no attempt "to relieve the market agencies from liability imposed by State law for selling cattle for principals who were not the owners".[5]

The petitioner's contention that it is required to serve all customers without question and unquestioningly to accept all cattle tendered for sale (whether owned, mortgaged, stolen or fraudulently procured) is not supported by the Act. The Act does not so provide. The Act expressly authorizes every market agency "to establish, observe and enforce just, reasonable and non-discriminatory regulations and practices". As was said in *Carnes v. St. Paul Union Stockyards*, 175 Minn. 294, 221 N. W. 20:

> " * * * such institutions may, without incurring liability, deny the use of their facilities to dishonest traders and so protect the general public. Dishonest traders should not be permitted to do business in the yards."

Similarly, in *Birmingham v. Rice Bros.*, 238 Ia. 410, 26 N. W. (2d) 39, it was said:

> " * * * an agency is not required to handle stolen livestock or livestock to which the title of its principal is defective and may make reasonable requirements that one proposing to deal with it establish his identity and the ownership of and title to the livestock involved."

and further:

> "Certainly, Congress did not adopt the Packers and Stockyards Act to encourage and protect the operation

[5]199 F. (2d) 677 at 679

of fences for handling property stolen or procured by fraud."

Under a fair interpretation of the Act, any market agency is permitted, by non-discriminatory regulations, to take reasonable measures to protect itself against imposition.

It is evident that the market agency may, in this connection, require its customers to furnish proper identification, evidence of credit responsibility, an indemnity bond, or suitable evidences of title. Any risks inherent in the situation of the market agency may well be insured, if insurance is desired, with the cost thereof recognized as an expense of doing business. It is submitted that the Court of Appeals was correct in holding that the Act "in no wise impairs the freedom of market agencies to adopt proper measures to prevent and suppress fraud".[6]

Since commission firms have conducted their business, both before and after the passage of the Act, in a legal situation which imposes liability for conversion in the circumstances here presented (see *Johnson v. Martin*, 87 Minn. 370, 92 N. W. 221 (1902)), and since proper measures for protection are still available, the decision below does not offend the Commerce Clause.

There is no evidence of a congressional intent to preempt the entire field of regulation and supersede existing rules of property and tort law. Only where the entire field of regulation is preempted is State law superseded. *Second Employers Liability Cases*, 223 U. S. 1: *Philco Corporation v. Phillips*, 133 Fed. (2d) 663.

Petitioner's argument as to equal protection of the laws assumes that every market agency in every State is entitled

[6] 199 F. (2d) 677 at 679.

to be governed by identical rules of property and tort law. If it is competent for market agencies to adopt reasonable, non-discriminatory regulations to prevent fraud and imposition, it follows that this argument also is without merit. The intention of the Act is pressed beyond reasonable bounds by the assertion that market agencies are endowed with a vested right to require uniformity of State laws of property and tort. The rules of law applied in the instant case are general. They apply equally to "market agencies", factors and all other selling agents. There is, of course a fundamental distinction between a commission firm and a common carrier in that the latter does not in any manner deal with title, whereas the commission firm assists in the transfer of title.[7] Unlike the common carrier, the market agency may adopt proper regulations for its protection, and unlike the carrier, it assists the principal in the actual transfer of title. Both circumstances indicate the propriety of different rules of liability in the two situations.

Petitioner's argument as to due process of law is in effect grounded upon the same premises as the argument with respect to the Commerce Clause and the Equal Protection Clause. It is to be rejected for the same reasons. The rule of conversion is no more a denial of due process to market agencies than it is to other factors and agents to whom it obviously applies.

There is no conflict between the decision below and the decision of any other Court of Appeals. The same arguments here urged by counsel for petitioner have been urged upon this Court previously, without success, in petitions for cer-

[7]The importance of this distinction is noted in *Mason City Production Credit Association v. Sig Ellingson and Company*, 205 Minn. 537, 286 N. W. 713 and cases cited therein.

tiorari and petitions for rehearing in *Rice Bros. v. Birmingham*, 332 U. S. 768, reh. den. 332 U. S. 820; *Sig Ellingson and Company v. Mason City Production Credit Association*, 308 U. S. 599, reh. den. 308 U. S. 637.

The weight of general authority sustains the decision below. *Birmingham v. Rice Bros., supra; Mason City Production Credit Association v. Sig Ellingson and Company, supra; First National Bank of Pipestone v. Siman*, 67 S. D. 118, 289 N. W. 416; *Moderie v. Schmidt*, 6 Wash. (2d) 592, 108 Pac. (2d) 331; *Citizens State Bank v. Farmers Union Livestock Coop. Co.*, 165 Kans. 96, 193 Pac. (2d) 636. In the last mentioned case the Court said that argument for immunity is "far fetched and lacks substance". In the *Mason City* case the Solicitor General of the United States appeared on the brief in opposition to the granting of certiorari, a significant indication of the administrative interpretation of the Act.[8]

4. Considerations of policy

Since the purpose of the Act was to curb "unfair, discriminatory or deceptive practices", it is pertinent to inquire whether this purpose will be aided or impaired by indulging the rule of immunity suggested by petitioner.

[8]Petitioner's argument as to the effect of the Packers and Stockyards Act has support in *Blackwell v. Laird*, 236 Mo. App. 1217, 163 S. W. (2d) 91, and *Sullivan v. Wells*, 89 Fed. Supp. 317, and a third case, not directly in point, has used language sympathetic to petitioner's position (*Montana Meat Co. v. Missoula Livestock Auction Co.*, —— Mont. ——, 230 Pac. (2d) 955). Of these cases, only *Blackwell v. Laird* (decided by a Missouri court of intermediate jurisdiction) is clear authority for petitioner's position. *Sullivan v. Wells* applied the Nebraska law (which adopts the theory of voidable title) and discusses the Packers and Stockyards Act as an additional reason for arriving at the result. The *Montana Meat Co.* case involved the validity of a local state statute which undertook to liberalize the rule of liability as applied to commission firms. It is not authority for the proposition that the Act abrogates the common law.

If, as appears above, market agencies may adopt "proper measures to prevent and suppress fraud", they should not be relieved of the necessity of so doing.

It is to be inferred that the petitioner does not desire to take the necessary measures for its own protection, preferring (by reliance upon artificially implied immunity) to cast the burden elsewhere—upon the isolated farmer, the village sales barn and the small local dealer, none of whom can readily command the facilities for adequate protection. In this connection, the language of the trial court is relevant.

> "In adopting legal principles the court must ever bear in mind the result of their application in practice. To relieve a market agency of liability in tort for a wrongful conversion would open the door to fraud and pave the way for irresponsible speculators to go about the country searching out unsuspecting subjects for their fraudulent operations. The place to prevent such conduct is in the central market where agencies are authorized under the law to engage in the business of selling livestock. The public welfare, including that of livestock producers, must have equal consideration with that of those who are engaged in conducting market agencies" (100 F. Supp. 781, at 787).

It is submitted that central market agencies have the statutory authority and the practical means, if they so desire, to curb the dealing in stolen, mortgaged and fraudulently procured livestock. In fact they are most favorably situated to take the necessary corrective action. The abrogation of their common law liability would remove the incentive to insist upon proper practices and would in effect foster and facilitate practices detrimental to the producers whom the Act was designed to protect.

CONCLUSION

It is urged that since

(a) the decision below is not in conflict with the decision of any other Court of Appeals,

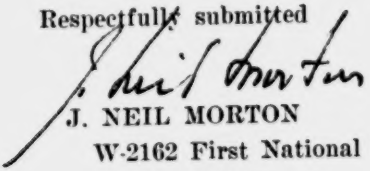
(b) the decision below is not in probable conflict with applicable local decisions,

(c) no important question of federal law is involved,

(d) no probable conflict with applicable decisions of this Court is indicated,

the petition should be denied.

Respectfully submitted



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